IT Alliance for Public Sector
A Division of ITI

May 18, 2015

Senator Lee Beyer
Chair, Committee on Business and Transportation
Oregon Senate
900 Court St. NE
Salem, Oregon 97301

RE: House Bill 2375-A – OPPOSE UNLESS AMENDED

Dear Senator Beyer:

The Information Technology Alliance for the Public Sector (ITAPS)[1] writes to express its opposition to House Bill 2375-A, unless the bill is amended to address our concerns. HB 2375-A calls upon the Attorney General (AG) and the Department of Administrative Services (DAS) to create a "contract form" that must be used by all state agencies "without alterations." The bill states that the 'contract form' means a document with terms and conditions that the AG and DAS develop, approve and make available for state contracting agencies to use without alteration, except as provided in subparagraph (B), as the terms and conditions of a public contract.

While we support efforts by the state to create and disseminate a "contract template" of standard IT Terms and Conditions, we strongly oppose codifying such a requirement in statute. Doing so will limit the authority of the purchasing officials and might cause the state to miss out on beneficial innovations because the state's "standard terms" are rigid and inflexible. To cite just one example, the technical innovations and reduced costs made available by cloud computing cannot occur based on the same standard terms used to procure hardware for the state's data center.

In a letter to Karen J. Johnson, Oregon's Assistant Attorney General, dated December 22, 2014 (see attached), ITAPS expressed its concerns with the direction the state was taking with its contract template. At the time we warned that the "proposed non-industry standard revisions to the state's existing contract template will ultimately lead to longer negotiation cycles, fewer bidders, and higher prices." We urged Oregon "to retain an approach that is more benign (though not without remedy) and to rely upon contract terms that are much more commercially acceptable than what is proposed. More in-depth or special terms can be proposed, and negotiated, if warranted by the facts, special circumstances or extraordinary risks of a particular future IT project. But these situations should be treated as "exceptions" and not drive the norm of contract terms and conditions."

Now, with passage of this bill, the state will be locking itself into a straightjacket. While we recognize that there are some exceptions to the requirement, as contained in Section 2 (c), we do not believe

[1] **About the IT Alliance for Public Sector (ITAPS):** As a division of the Information Technology Industry Council (ITI), ITAPS is an alliance of leading technology companies offering the latest innovations and solutions to public sector markets. With a focus on the Federal, state and local levels of government, as well as on educational institutions, the ITAPS team advocates for improved procurement policies and practices, while identifying business development opportunities and sharing market intelligence with our industry participants.

these exceptions will be sufficient. We believe that agencies will be afraid to even ask for permission to deviate from the standard contract template, given this statutory requirement.

We find it unfortunate that Oregon is moving in the direction of rigid procurement processes and procedures. Other states, while mindful of the need for reducing risk in state contracting, have adopted more enlightened approaches. For example, the State of California has been using a decade-old law known as Section 6611, which provides statutory authority for permitting post-bid negotiation. Today, because the state has realized the benefits that are derived from this negotiation authority, nearly all large IT services bids are done under the authority of this section of the California's public contract code. State procurement, vendors and IT officials have come to rely on the flexibility it provides.

States are seeing added pressure to improve procurement rules and processes. Almost all states realize that better Terms & Conditions will generate more robust competition, which will in turn drive down prices by vendors and in turn save taxpayer money. Many states, perhaps even most, understand "risk" must be a shared proposition.

We also want to point out that a related bill, HB 3099, is moving through the legislative process. This bill recognizes the importance of empowering the state CIO with increased authority over statewide IT planning, acquisition, oversight, rulemaking, etc. If HB 2375-A is passed in its current form, the legislature will be granting the governor's primary advisory for information technology with new authority, but, with adoption of the restrictive contracting elements of HB 2375-A, then removing and restricting an important aspect of his/her authority over IT acquisition. We think this outcome would be both ironic and unfortunate.

We would like to express support for Section 5 of the bill. It calls on DAS "to develop and evaluate advice and recommendations for promoting best practices in public contracting that are predicated on previous successes and failures, reducing risks and inefficiencies and otherwise improving accountability, responsiveness, effectiveness and quality in public contracting." This is both laudable and necessary.

If you have any questions, please contact me at 650-544-7563 or chenton@itic.org. Thank you for considering our concerns.

Sincerely,

Carol Henton

Carol Henton
State, Local and Education, Public Sector

Cc: Senator Rod Monroe
Senator Chuck Thomsen
Senator Chuck Riley
Senator Fred Girod
George Naughton, DAS Director
Alex Pettit, Chief Information Officer, DAS

IT Alliance for Public Sector
A Division of ITI

December 22, 2014

Karen J. Johnson
Assistant Attorney General, Department of Justice
State of Oregon
Salem, OR

RE: Formal comments on public draft of the Oregon revised terms and conditions template for standard information technology services

Dear Ms. Johnson:

The Information Technology Alliance for Public Sector (ITAPS), on behalf of its member companies, appreciates the opportunity to provide comments regarding Oregon's public draft of its revised terms and conditions template for standard information technology services. We want to thank you, Dianne Lancaster, and other state officials for your engagement with the information technology community. Our comments are made in the spirit of furthering this positive working environment.

We appreciate your recognition that the innovation and products offered by the information technology sector cannot only offer widespread system flexibility and cost savings, but also can be leveraged to ensure that the taxpayers and state agencies receive the highest possible outcomes in project and system deliverables.

Accompanying this letter are the individual comments of several member companies of ITAPS namely CA Technologies, CGI, Deloitte, HP, and Microsoft. Their comments reflect a diversity of views and raise many issues for consideration.

Separate template for cloud services is needed

The technology industry has evolved into multiple sectors – including hardware, software, cloud computing, and managed services -- requiring terms and conditions that are specific and tailored to the particular goods or services being acquired. We recognize that the current effort by Oregon officials is limited in scope and is only intended to focus on IT services. When finished with this effort, we urge you to develop a similar template for the newest types of service delivery solutions known as cloud services. Even within cloud computing there are different models including Software as a Service (SaaS), Platform as a Service (PaaS), and Infrastructure as a Service (IaaS), which may each require a unique set of IT terms and conditions. By adopting cloud services, Oregon will benefit from the acquisition of new technologies that deliver more value for less money. In the meantime, we urge the state to make clear that the current revision will not operate as a template for cloud-based services.

Need for balanced risk in IT contracts
Several leading IT companies expressed reservations about provisions in Oregon's draft template. Their direct experience has shown that states benefit from robust competition among the most capable IT service and solution providers. In all situations, whether selling to government clients or private sector customers, leading IT vendors are careful to assess the risk of each engagement and will decline to participate in procurements that present excessive risk or put in jeopardy a company's right to utilize its intellectual property.

ITAPS believes it is in the mutual interest of the public sector purchaser and the IT vendor community to narrow the differences between commercial contracting practices and a state's required terms and conditions. The benefits are improved competition and the procurement process operates more quickly because there are fewer issues to negotiate. This can be important where a public purchaser has limited personnel available for protracted negotiations. In our view, Oregon's revised template contains numerous provisions that depart from industry standard commercial contracting practices. Inclusion of these types of provisions will limit competition by limiting the number of participating vendors in procurements.

Avoid unnecessary complexity; tailor to acquisition particulars
In Oregon's draft template, many of the proposed terms presuppose individual and specific transaction types. Throughout Section 3 ("Scope of Services"), the terms and conditions would impose a project management process. For example, Section 3.1.1 ("Responsibility of Contractor") requires the contractor to agree to employ to the PMI project management methodology. Another example is at Section 3.4 ("Acceptance Testing"), which presents a lengthy and complex sequence of system and user testing. It may not serve the interests of either the state or its providers to take this "prescriptive" approach in the standard contract document. These and similar technical provisions are potentially relevant only to certain types of representative IT transactions; in many others, they are inoperative. The specified methodologies do not appear to accommodate "Agile" implementation methods, where requirements are developed both cooperatively and interactively. If too many extraneous terms are included in the standard template, the result likely will be lengthy and contentious negotiations. We urge the State not to attempt to address all solution delivery alternatives by a single contract template. The standard template should include core standard terms that apply to all IT contracts. The state may consider using "modules," with terms and conditions tailored to particular types of acquisitions, to supplement the standard terms.

Reasons not to take a "worst case" approach
Some of the changes Oregon proposes appear to be in reaction to the recent failed health exchange experience. Presumably, these are intended to protect the state against recurrence of similar performance issues. However, we believe it will not serve the state's interest to address all conceivable contingencies in a standard contract template, especially where, as here, the intent is to transfer more performance risk to the contractor. Not all state IT projects present high execution risks. The proposed revision changes the standard contract document by adding risk-shifting provisions and changing other terms to materially increase potential contractor liability. It is neither

necessary nor reasonable for the standard IT contract template to include onerous terms and conditions.

- We anticipate that some leading IT companies will evaluate the new standard contract and elect not to do business with Oregon. Even if the State is willing to negotiate, companies often decide whether to participate based upon their assessment of the reasonableness and risks presented by the initial RFP and the model contract.
- Many and perhaps all bidders will insist upon negotiation of many terms, in order to mitigate the potential liability and manage performance risk. This may make it difficult for the State to properly evaluate different bids that include changes in the potential liability and performance risk associated with the proposed contract.
- Companies will respond to greater performance and liability risk with higher prices than otherwise would be bid for a scope of work. Where prices are elevated to address risk contingencies, the state will receive less, not more for its money.

Specifically, we wish to direct your attention to several key areas where the state should modify the proposed terms in order to achieve a more balanced approach and shared risk.

Holdbacks and/or Withholding Final Payment

We contend a holdback of 15% is unreasonable and is beyond industry norms. If Oregon makes a 15% withhold a standard feature of its new template, it will force difficult negotiations for every RFP, especially when the contract value of the bid is significant. And again, the result will be that some companies will elect not to even bid. The state should limit the "hold back" to no more than 10%.

Patents, Copyrights, Intellectual Property

ITAPS members are concerned about the approach taken by the public draft with respect to intellectual property. These are subjects of fundamental importance to IT contractors. First, there is an apparent contradiction between the definition and treatment of "Work Product," on the one hand, and that of "Contractor Intellectual Property," on the other. The definition of "Work Product" encompasses virtually anything and everything made by a contractor (or its subcontractors) "pursuant to the Contract." Such Work Product, according to Section 8.2, is to be considered "work made for hire" which, the state asserts, is the exclusive property of the purchasing agency. As written, this is not likely to be acceptable to any leading IT providers. The proposed IP clause also implies that working for Oregon could divest a company of its right to improve or further utilize the work product it creates using its intellectual property. Although Section 8.1 states that contractors retain ownership "of all contractor Intellectual Property," it is hard to reconcile this with the state's assertion of exclusive ownership of the Work Product that is the embodiment of that IP. At the very least, the tension between these provisions will lead to extended negotiations, prompt disputes, and lead some companies to walk away from the opportunity to bid.

Viewed as a whole, the proposed IP approach is retrograde. It enables the state to claim ownership and control IP in Work Product. It could limit a contractor's ability to pursue future engagements

and enable the state to use Work Product to compete against the contractor. California abandoned this "ownership" approach more than a decade ago, in 2003. Since then the trend has been for states to receive appropriate and necessary license rights – "government purpose license rights" or limited "rights of data" – to use Work Product and IP. The federal government uses this licensing approach. Now, however, Oregon is proposing to treat Work Product as property that it owns and controls. We are unaware of the reasons for this radical change. We do not know why Oregon believes its current license approach is not sufficient. The license approach is known to be workable and is broadly supported by industry. Even if some scenario demands a different approach, this does not justify abandoning the present license approach. Contractors should be able to do business with Oregon without worry that they are at risk of forfeiture or compromise of IP rights, which, especially in the IT industry, are crucially important.

The proposal also should be clear that any software or other materials developed or obtained by or for the contractor, independent of the contract, shall be considered pre-existing materials and shall not constitute Work Product. If there is derivative work created from the pre-existing materials, then only those derivative elements should constitute Work Product. No standard contract provision should preclude the contractor from developing materials outside of the contract that are competitive. Nor should the standard contract restrict the ability of a contractor to use its intellectual property in future engagements. Should Oregon move to an ownership approach, it will be going against trends in nearly all states and will be out of step with what is the federal norm.

Indemnification

Oregon's proposed standard General Indemnity is overly broad and out of synch with current public sector contracting practices. Versus the present standard clause, several changes are highly objectionable. One is that the indemnity now will extend to "intangible" personal injury. This is potentially uninsurable. It should remain limited to third party claims due to personal injury, including death, damage to real property and tangible personal property only when there is intentional misconduct, reckless acts, gross negligence or omissions by the contractor and its subcontractors. The proposed clause also would extend an indemnity to third party claims for breach of a contractor "representation, warranties, or covenants." In operation, it could allow third parties to avail themselves of rights otherwise and ordinarily only reserved to the state as the purchaser. The clause itself is novel and this expansion of litigation risk and liability would be virtually unprecedented. Also objectionable is that the state does not accept a proportionate share of responsibility where its personnel contribute to a liability. As also is true in the current provision, a contractor is excused from indemnification only if liability is "attributable solely" to state acts or omissions. The view of ITAPS is that the indemnification obligation of a contractor should be reduced proportionately where acts or omissions on the part of the state contribute to liability.

Limitation of Liability (Section 9.1)

We are disappointed that Oregon intends to raise the limit on the contractor's liability for damages to the State to 1.5 times the maximum not-to-exceed value of the contract, and we are concerned with expansion of the "carve-outs" from the limitation of liability, as these could destroy the economic value of this critical clause. One new carve-out is for liability arising from claims, under

the new Section 12.5 ("Data and Network services"), related to data loss or breach of security. This potentially exposes contractors to enterprise-threatening liability for cyber events. Such events may not be preventable. Contractors cannot accept exposure for intangible injury for losses of data. Another new carve-out is for claims arising from Section 9 ("Contractor's Duties Confidentiality and Non-Disclosure"); similar objections apply. We also object to a carve-out now proposed for liquidated damages because it suggests a "double liability." We also continue to believe that the carve-out for IP indemnity is overbroad. Collectively, the carve-outs, combined with new and unusual potential sources of liability are contrary to industry standard practices and will limit competition in state procurement due to vendor's reluctance to accept the risk. The state should expect and anticipate strong resistance from the IT vendor community.

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Limitation of Damages (Section 9.2)
The same objections we have raised to changes to the Limitation of Liability (Section 9.1) extend with equal if not greater force to Section 9.2. It is fundamental to IT contractors that they not face exposure to damages for consequential, incidental, indirect, special, or punitive damages, even if notification has been given as to the possibility of such damages, except to the extent that the contractor's liability for such damages is negotiated and specifically set forth in the Statement of Work. Under the proposed Section 9.2, there are now four categories of carve-outs from the provisions that otherwise protect either party from liability for lost profits, lost savings, lost data, punitive, indirect, exemplary, consequential or incidental damages. As shown by the continuing review by the National Association of State Chief Information Officers (NASCIO) on this important subject, the trend among states is to recognize that states benefit from a willingness to agree to limit the nature of damages that can be recovered and to commit to limits of liability that have a close relationship to contract value. Oregon's proposed changes to Section 9.1 and 9.2 are contrary to industry standard practices and will limit competition in State procurements due to Vendors reluctance to accept the risk.

Warranty
ITAPS has several concerns about the expanded warranty coverage in the proposed revisions, particularly at Section 3.7.1 ("Post-Implementation Warranty Period"). The state would impose a 365-day system warranty to all projects. This is longer than industry standard practices. It imposes substantial costs (and additional risks) on the contractor that likely will be reflected in higher prices. Our members believe that it is important, once Final Acceptance criteria are satisfied, for the state to assume principal responsibility for system operation and to enter into separate contracts for maintenance and support then required.

If the state determines that it is necessary to secure this extended warranty coverage, within the implementation contract, it should be plainly specified in the RFP as a special provision. Similarly,

we urge the agency to use the RFP to inform vendors where the contract will require non-industry or other unusual terms. This approach would enable the state to establish "standard" terms of general applicability that are less likely to be controversial and to require negotiations. Where higher level or different demands are made, these should be called out in the RFP so that prospective bidders are informed and to facilitate contractor inquiries and state response before proposals are due.

Mutuality

The experience of our member companies is that IT projects are more likely to succeed where there is mutuality of responsibility and obligation and where both provider and customer have a stake in successful project execution. Contract terms that push excess risk to the vendor, or purport to immunize the state from any failures in its performance, are much more likely to produce claims, controversies and delay than improved outcomes. In several respects, the new proposed standard IT contract flouts this proposition. For example, we urge Oregon to re-examine Section 3.2 ("Responsibilities of Agency"), a clause which, we acknowledge, has not changed from the present form used in the state's standard IT Services Agreement. That clause allows that a contractor may recover additional costs if an agency "fails to provide the requisite quality or quantity" of "resources" specified in the contract. As written, this does not recognize the dimensions (or importance) of the varied responsibilities a state may assume for a DDI implementation to succeed. For example, many such projects require the state to furnish data, to convert or validate data formats, and to review and approve many proposed submissions over the course of performance. Contractors should have a remedy to recover if the state does not perform these and other obligations it undertakes in an IT implementation project, without having to establish that the cause of the state's non-performance or delay was the absence of promised "resources." Also, the clause states that for the first 30 days of delays caused by resource shortfall, the contractor's remedy is limited to schedule extension. This fails to recognize the economic reality that delays in necessary state performance can mean that dozens or even hundreds of members of a contractor workforce are unable to complete their function because of such delays. Even if the duration is for less than a month, the costs can be substantial, and there is no reason that a contactor should be precluded from seeking to recover such costs.

Conclusion

We are concerned that the proposed non-industry standard revisions to the state's existing contract template will ultimately lead to longer negotiation cycles, fewer bidders, and higher prices. We urge Oregon to retain an approach that is more benign (though not without remedy) and to rely upon contract terms that are much more commercially acceptable than what is proposed. More in-depth or special terms can be proposed, and negotiated, if warranted by the facts, special circumstances or extraordinary risks of a particular future IT project. But these situations should be treated as "exceptions" and not drive the norm of contract terms and conditions.

ITAPS also believes that "mutuality" is a critical proposition in the success of contracts and project execution. While the state can and should protect its important interests, the prevailing view among

experts is that mutuality of opportunity, responsibility and risk is more likely to produce a positive project outcome than the use of terms that attempt to shift virtually every risk to contractors and impose unusually severe penalties in the event of performance dispute. If Oregon is determined to insist that IT vendors undertake an unreasonable share of the project risk and assume unreasonable financial exposure, the result is likely to be fewer bidders, less robust competition, higher prices, further delays in the acquisition process, and more litigation. The better course, which we believe to be mutually advantageous both to seller and purchaser, is to align Oregon's terms and conditions and contracting practices so that they converge with information technology business best practices adopted in other states.

Finally, I would like to acknowledge the assistance of Bob Metzger in preparing this letter. Mr. Metzger is an attorney in private practice with the firm of Rogers Joseph O'Donnell, P.C. and has been recognized for his contribution to successful procurement reform efforts in several states, including Oregon.

We very much appreciate the opportunity to provide these comments and we look forward to a continued dialogue with Oregon officials on this matter. Should you have any questions, please do not hesitate to contact me at chenton@itic.org or 650-544-7563.

Sincerely,

Carol Henton

Carol Henton
Vice President, State, Local and Education Technology

cc: Dianne Lancaster, Chief Procurement Officer, Oregon Department of Administrative Services
Alex Pettit, Oregon Chief Information Officer (CIO)